(5)

No. 87-2086

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

v.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

BRIEF OF RESPONDENT THE KOLL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Respondent The Koll Company ("Koll") addresses principally the second issue raised by the Petition For Writ of Certiorari—whether Petitioners can avoid the application of the constitutionally based privilege reflected in the *Noerr-Pennington* doctrine as a bar to their antitrust claims, where their only claims arise out of Koll's successful petitioning of local governmental bodies, and when, on three occasions, Petitioners have pled only vague and conclusory averments, none of which falls within any exception to *Noerr-Pennington*.

LIST OF PARTIES AND AFFILIATES

As required by Supreme Court Rule 28.1, Respondent The Koll Company hereby states that it has no parent company and no subsidiaries other than wholly owned subsidiaries. The list of named parties contained in the Petition For Certiorari is correct, with the following exceptions: Frank Taylor was never served with Petitioners' complaint or amended complaint and is not a party; and the reference to "Arnold" Goglio should refer instead to "Donald" Goglio. Respondent The Koll Company also certified to the Ninth Circuit the following persons, not named as parties, who had an interest in the outcome of the proceeding:

Koll Pueblo Uno Assoc., a General Partnership

Pueblo Uno Partners, a General Partnership

Pueblo Uno Investors, a General Partnership

H&H—Pueblo Uno, a General Partnership

HFJA—Pueblo Uno, a General Partnership

PAT&J—60 South Market St., a Limited Partnership

Nolte—Market St., a General Partnership

Westwood Company—Market St., a General Partnership

LMF&T—Properties I, a Limited Partnership

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For the reasons set forth herein, Respondent The Koll Company ("Koll") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

This lawsuit arose out of Petitioners' complaint that they were unable to obtain adequate parking facilities in downtown San Jose, California, to meet the needs of tenants in their office building. Petitioners' claims against Koll arose solely out of Koll's successful efforts to obtain local government action, through the City of San Jose ("the City") and the Redevelopment Agency of the City of San Jose ("Redevelopment Agency"), allowing Koll to build an office building in downtown San Jose. The appeal before the Ninth Circuit arose out of the dismissal of Petitioners'

Second Amended Complaint by the United States District Court for the Northern District of California, for failure to state a claim upon which relief could be granted.

Petitioners' Original and First Amended Complaint

Petitioners' original complaint, filed on December 12, 1984, asserted ten claims against Koll, the City, and the Redevelopment Agency. When the City and the Redevelopment Agency moved for judgment on the pleadings, Petitioners requested leave to amend, which was stipulated to by the defendants. On May 8, 1985, Petitioners filed their First Amended Complaint adding Respondent Frank Taylor, the head of the Redevelopment Agency, as a named defendant. The First Amended Complaint asserted only two causes of action against Koll, one of them for alleged violation of the Sherman Act.[1]

Both Koll and the City moved to dismiss the First Amended Complaint. At the hearing on their motion on July 9, 1985, the district court indicated its preliminary assessment that Petitioners' antitrust claims were deficient, and allowed Petitioners a third opportunity to state a claim. The district court cautioned Petitioners that their claims would be dismissed with prejudice if they were unable to state adequate claims for relief in their third attempt. On July 25, 1985, Petitioners filed their Second Amended Complaint, the dismissal of which was the subject of the appeal to the Ninth Circuit.

Petitioners' Second Amended Complaint

In their Second Amended Complaint, Petitioners averred that they were induced by the City and the Redevelopment Agency to build a large office building in the Pueblo Uno Redevelopment Project Area ("the Project Area") in San Jose by the "promise of

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[1] 15 U.S.C. §§ 1, 2. The other claim asserted against Koll was for the alleged violation of the Civil Rights Act, 42 U.S.C. § 1983. Petitioners do not ask this Court for review of any issue related to this latter claim, which was also dismissed by the district court.

protection in the form of City-provided parking facilities."[2] Petitioners claimed that the original Pueblo Uno Redevelopment Plan ("the Redevelopment Plan") adopted by the City Council specified that the City intended to provide parking within the Project Area to be used by all those who invested in the Project Area. SAC ¶ 15. Petitioners alleged further that, in obtaining financing for their office building and in designing their building with inadequate parking, they relied upon the Redevelopment Plan, as well as upon "repeated assurances" from *unnamed* employees of the City and the Redevelopment Agency that parking would be provided by the City. SAC ¶¶ 29-31, 40.

Thereafter, a parcel of land in the Project Area originally designated for public parking was conveyed by the City to Koll for the construction of an office building. This new building included more than 800 parking spaces to serve Koll's tenants. SAC ¶¶ 38, 51. According to Petitioners, Koll was permitted to construct its building as a result of an amendment to the Redevelopment Plan adopted by the San Jose City Council after at least two public hearings. SAC ¶¶ 47, 51. Petitioners then alleged that they had been induced by unnamed City and Redevelopment Agency officials not to oppose the amendment to the plan which allowed the conveyance of the land for the proposed public parking site to Koll by assurances that alternative public parking would be provided. SAC ¶¶ 39, 46. Petitioners further alleged that the Redevelopment Agency eventually reneged on this "promise" to provide "alternative parking" at another location. SAC ¶ 67. As a result of the lack of adequate parking facilities in their own building, Petitioners contended they were unable to attract enough tenants to operate economically, and thereby incurred damages in excess of $56 million. Petitioners did not allege, in either their original or their amended complaints, that any representations were made to them by Koll.

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[2] *See* Petitioner's Second Amended Complaint, ¶ 4, reprinted as Appendix C in Petitioners' Appendix herein. Hereafter, references to the Second Amended Complaint will be as follows: "SAC ¶ ___."

The Opinion of the District Court

After three attempts, Petitioners' pleading failed to state facts constituting a claim against Koll. Petitioners claimed in a conclusory manner that Koll "conspired with defendant City and Agency officials, Frank Taylor, and [other unnamed] co-conspirators . . . to interfere with plaintiffs' business, eliminate plaintiffs as a competitor," SAC ¶ 5(d), and "receive preferential treatment." SAC ¶ 11(b). As the Ninth Circuit acknowledged in its opinion, Petitioners alleged that Koll violated the antitrust laws by four basic actions:

> (1) Koll "developed close relationships with City and Agency officials, [and] made *ex parte* secret contact with those officials. . . ." SAC ¶ 11(a);
>
> (2) Koll conspired with the co-defendants "in making false property appraisals, financial analysis, and misrepresentations . . . and to mislead the legislative body to induce it to adopt and pass the Koll development agreement. . . ." SAC ¶ 11(h);
>
> (3) Koll "secretly negotiated with the City" and had "secret contact and agreements with City and Agency officials," to amend the Redevelopment Plan. SAC ¶ 11(c), 11(e);[3]
>
> (4) Koll "created special relationships with City officials, hired key City officials, and made direct payments and other valuable considerations and inducements to City and Agency personnel."[4] SAC ¶ 27.

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[3] Presumably the referenced "agreements" were agreements by the City to amend the Redevelopment Plan to allow Koll to build its own office building and parking facility. The only other agreement referenced in the Second Amended Complaint was an alleged agreement among Koll and the City and the Redevelopment Agency "not to contact other City agencies" about Koll's proposal. SAC ¶ 32. This latter claim refers to the City Council's decision to issue a negative declaration as to the environmental impact of Koll's proposed development. SAC ¶ 56.

[4] These amorphous averments were not further developed elsewhere in the complaint. Petitioners' counsel later submitted declarations to the

The district court examined these claims against Koll, as well as Petitioners' other averments, and concluded that it had "no difficulty" in determining that, as pleaded for the third time, Petitioners could prove no set of facts to support their claims which would entitle them to antitrust relief against the defendants.[5] The district court held that Koll's conduct alleged in the complaint was immune from antitrust liability under the *Noerr-Pennington* doctrine.[6] In so holding, the district court expressly acknowledged the case law cited by Petitioners holding that the *Noerr-Pennington* doctrine does not protect those who employ illegal means to influence government and does not protect actions that go "beyond traditional political activity." "However," the district court reasoned, "in the instant case, nothing is

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district court in which he listed various campaign contributions in small amounts allegedly made from 1979 through 1985 primarily by officers and employees of Koll to City officials. As the Ninth Circuit recognized in its opinion, nowhere in the complaint did Petitioners allege that there was anything unlawful or improper about those campaign contributions; nor did they allege anywhere in the complaint that any bribery had occurred.

[5] Memorandum of Decision, January 24, 1986, at 8, reprinted as Exhibit B in Petitioners' Appendix, at A-28 (hereafter "Petitioners' App. B"). The court made this statement in connection with its ruling that defendants' conduct was protected under the principles of state action immunity set forth in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). Since the state action immunity serves to remove the parties' alleged conduct from the scope of the Sherman Act, it also immunizes Koll's conduct as a private party acting in concert with the governmental agencies. *See, e.g., Cine 42nd Street Theatre Corp. v. Nederlander Org.*, 790 F.2d 1032, 1048 (2d Cir. 1986); *Mercy- Peninsula Ambulance v. San Mateo County*, 791 F.2d 755, 759 (9th Cir. 1986). Because the questions presented as to the applicability of *Parker v. Brown* are discussed in the City's accompanying brief, they are not addressed here. However, *Parker v. Brown* was an additional ground for the dismissal of Koll.

[6] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

pleaded, beyond conclusory materials, to properly allege unlawful conduct on the part of The Koll Company or activity transcending legitimate lobbying." Petitioners' App. B, at A-30.

In concluding that Petitioners' averments failed to state a claim, the district court expressly referred to Federal Rule of Civil Procedure 9(b), explaining that the Rule requires specificity if some "impropriety in the nature of bribery" or other such grave allegations had been intended. Petitioners' App. B, at A-25-26. The district court also held that Petitioners had failed to plead a conspiracy, having failed to allege "at a minimum" the authority of those who purported to do the acts alleged in support of the claimed conspiracy.

The Opinion of the Ninth Circuit

The Ninth Circuit affirmed the district court's order and judgment dismissing Petitioners' Second Amended Complaint. The court of appeals, like the district court, focused its opinion upon the conclusory and nonspecific nature of Petitioners' allegations. In the portion of the Ninth Circuit's opinion that addresses the *Noerr-Pennington* doctrine, the court explained at the outset that its review of Petitioners' arguments as to the sufficiency of the complaint was guided in part by "the fundamental first amendment values that the *Noerr-Pennington* doctrine is designed to protect." 841 F.2d at 894. The court explained:

> In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations demonstrating that the *Noerr-Pennington* protections do not apply. . . . Conclusory allegations are insufficient to strip them of their *Noerr-Pennington* protection. Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity.

Id. (citations omitted), *citing Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1080-81 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

The Ninth Circuit then began its analysis with a determination as to whether the alleged activities on the part of Koll are the type that the *Noerr-Pennington* doctrine seeks to protect. The court held that the development of "close relationships" with City officials was the essence of lobbying and thus went to the heart of the *Noerr-Pennington* doctrine. The court found the same to be true of Petitioners' allegations that Koll made factual misrepresentations. The court noted that the alleged misrepresentations can be accommodated by the City Council and the Redevelopment Agency, "acting in the political sphere" and that, while such misrepresentations cannot be condoned, they are not of consequence under the Sherman Act.

The court then examined Petitioners' claims that Koll had "secret negotiations" with the City and reached "secret agreements" with the City, and the court held that these activities, too, were protected under *Noerr-Pennington* because: (a) Petitioners had not alleged that these activities were either illegal or outside the protection of the first amendment; (b) Petitioners did not allege that these activities occurred other than for legitimate petitioning of government; and (c) Petitioners had not alleged the nature of the agreements or meetings or identified the City officials involved. Even so, the court reasoned, *ex parte* meetings between government officials and petitioning individuals present a classic case for the application of *Noerr-Pennington.*

Likewise, the Ninth Circuit held that Petitioners' allegations of "payments to" and "hiring of" City officials were made "in the most conclusory of fashions. We are not told who, when, how much, or for what purpose." 841 F.2d at 895. The court noted that Petitioners did not allege that the claimed payments to, or hiring of, City officials was otherwise illegal. *Id.* Thus, the court concluded, the hiring of former City officials, presumably for their expertise, and Koll's conduct in paying honoraria or campaign contributions, were a traditional part of the political process and thus fell within the *Noerr-Pennington* doctrine.

Next, the Ninth Circuit considered Petitioners' contentions that their claims against Koll should fall within some exception to *Noerr-Pennington.* First, the court held that the "sham" exception did not apply because Koll genuinely sought official action

from the City and the Redevelopment Agency. Second, the court rejected Petitioners' argument, based upon *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), that Koll's alleged conduct constituted illegal or reprehensible activity which ought not to be immune. The court noted that the narrower standard of activities permitted under *California Motor Transport* involved an adjudicatory context. The court examined at length the context in which Koll's alleged "misconduct" took place and concluded that, although this case did not require it to draw a "bright line," the context was essentially legislative.

Finally, the court rejected Petitioners' argument that because they had alleged that City officials were co-conspirators, *Noerr-Pennington* immunity should not apply. The court noted that the authority of the Ninth Circuit's opinion in *Harman v. Valley Nat. Bank of Arizona*, 339 F.2d 564, 566 (9th Cir. 1964), had been repudiated. 841 F.2d at 897, *citing Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). More significantly, the court explained: "*Noerr-Pennington* cannot be removed by merely alleging that a government official was involved in the alleged conspiracy." 841 F.2d at 897. The court cited *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975) as rejecting such a blanket exception because it would abrogate the *Noerr* doctrine. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE NINTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *ALLIED TUBE*

The petition for writ of certiorari focuses principally upon Petitioners' contention that the Ninth Circuit's opinion in this case is in conflict with the Court's recent decision in *Allied Tube Corp. v. Indian Head*, 486 U.S. ____, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) ("*Allied Tube*"). The Ninth Circuit's opinion is not contrary to the holding in *Allied Tube*, nor does it conflict with the general approach taken by this Court in *Allied Tube*.

The central thrust of *Allied Tube* was the applicability of the *Noerr* doctrine to *private* standard-setting associations. The Court held that, despite the political impact of the conduct challenged in that case, because of its nature and its context—a private setting outside the political arena—it was the type of commercial activity that has traditionally been regulated by the antitrust laws. Quite the contrary is *this* case, where the alleged injury arose out of the legislative processes of the San Jose City Council in conjunction with the Redevelopment Agency. Nothing in *Allied Tube* affects the "wide berth" of antitrust immunity accorded to the traditional avenues of political expression which the Ninth Circuit affirmed were the only kinds of activity that Petitioners had alleged in this case.

The Ninth Circuit's approach in analyzing Petitioners' averments followed the general principles stated in *Allied Tube*. In *Allied*, the Court cautioned that the *Noerr* doctrine does not immunize every activity that is genuinely intended to influence governmental action, and that the ultimate legislative aim of the challenged conduct is not dispositive. Rather, the Court emphasized that the context and nature of the challenged conduct should be evaluated to determine whether it is political activity with a commercial impact or commercial activity with a political impact. In its opinion below, the Ninth Circuit made exactly that kind of evaluation.

The court of appeals commenced its analysis by determining whether the alleged acts were the kind that the *Noerr* doctrine seeks to protect. The court held that the complaint alleged nothing other than traditionally protected, legitimate lobbying of government. The court specifically held the context to be legislative. Contrary to Petitioners' assertion, the Ninth Circuit did not suggest that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. Rather, the Ninth Circuit expressly recognized that the range of immunized lobbying activities "would be much narrower" in an adjudicatory context. In light of the court's determination that the challenged conduct occurred in a legislative context and that no conduct was alleged beyond legitimate lobbying, the court of appeals properly did not draw a bright line between legislative

processes and adjudicative processes, nor did it decide what types of conduct, if any, might subject a party to antitrust liability in a purely political context.[7]

Petitioners suggest yet another reason for their assertion that there is a conflict between *Allied Tube* and the Ninth Circuit's opinion. Petitioners point to footnote 7 of this Court's opinion and contend that a "co-conspiracy" involving public officials should not be immunized. However, nothing in that footnote would have required the removal of *Noerr* protection for Koll's legitimate lobbying activities merely because Petitioners alleged a "conspiracy" in the most conclusory terms in their complaint.[8] If the mere allegation of a "conspiracy" were all that were required to create an exception to the *Noerr* doctrine, *Noerr* would be entirely abrogated, at the expense of the first amendment rights it was designed to protect.

Finally, Petitioners contend that the Ninth Circuit should have held that their claims fall within the "sham" exception to the *Noerr* doctrine. Petitioners base this argument upon the Court's criticism of the approach to the "sham" exception taken by the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d

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[7] The district court had expressly acknowledged the cases holding that *Noerr* does not protect certain illegal conduct or activities that go beyond traditional political activity. However, the district court found it did not need to determine the applicability of those principles to this case, since such activities were never properly pleaded. In fact, the conduct challenged by Petitioners—Koll's allegedly developing close relationships with government officials, allegedly using misrepresentations to induce governmental action, and allegedly making "payments" to government officials, all in a legislative context,—is precisely the conduct that was held immune by *Noerr*.

[8] Indeed, the referenced footnote concerned the difficulty of distinguishing in some cases between trade restraints resulting from government action and those resulting from private action. The case of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962), discussed in the footnote, in fact concerned the effects of the conduct of a private company, a subsidiary of Union Carbide, that was functioning as purchasing agent for the purchase of certain metals for the Canadian Metals Controller.

458, 465, n.5 (9th Cir. 1987), *cert. granted, vacated and remanded*, ____ U.S. ____, 108 S.Ct. 2862, 101 L. Ed. 2d 899 (1988). This argument, Koll submits, reflects a misreading of the Court's opinion.

In footnote 10 of *Allied Tube* the Court criticized the use of the "sham" exception as a catch-all exception that could apply to any activities which the courts deem unworthy of antitrust protection. The Court explained that "[s]uch a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action." 486 U.S. at ____, 108 S.Ct. at 1941, 100 L.Ed.2d at 510, n.10. The Ninth Circuit's opinion in this case is entirely consistent with that principle. Specifically, the Ninth Circuit held the sham exception to be inapplicable precisely because Petitioners never alleged that Koll was not genuinely seeking official action from the City and the Redevelopment Agency. 841 F.2d at 895.[9]

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[9] Petitioners also contend that the facts pleaded in their complaint "imply" bribery, and they argue that such allegations warrant an exception to *Noerr* based upon the Court's statement in *Allied Tube* that it has "never suggested that that kind of attempt to influence the government merits protection." 486 U.S. at ____, 108 S.Ct. at 1939, 100 L.Ed. 2d at 507. However, regardless of whether actual bribery would remove the protections of *Noerr*, Petitioners never alleged bribery in this case. Neither the district court nor the Ninth Circuit had any difficulty so concluding.

Additionally, Petitioners argue that the Ninth Circuit's opinion is in conflict with the Eighth Circuit's rulings on the sham exception in *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978), and *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). Quite the contrary, the Eighth Circuit, like the Ninth Circuit below, based its decision in those cases upon whether the defendants were genuinely seeking to influence governmental action.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS: NONE HOLD THAT AN EXCEPTION TO *NOERR* CAN BE INVOKED BY MERE CONCLUSORY AVERMENTS OF A CONSPIRACY INVOLVING A GOVERNMENT OFFICIAL

Petitioners contend that the Ninth Circuit's opinion below and the Seventh Circuit's opinion in *Metro Cable Co. v. CATV of Rockford, Inc.* ("*Metro Cable*"), *supra*, are in conflict with the Fifth Circuit, which recognized and applied a "co-conspirator" exception to the *Noerr* doctrine in *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053, 106 S. Ct. 788, 88 L. Ed. 2d 766 (1986) ("*Affiliated Capital*"). Upon the facts alleged in Petitioners' complaint, however, the issue of the existence or extent of the so-called "co-conspirator" exception is not squarely presented for review.

No court of appeals has held that the fundamental protection of *Noerr-Pennington* can be lost merely because a plaintiff alleges, without more, that a government official has "conspired" in the challenged conduct of a private party. Rather, the two cases in which a court of appeals has applied the so-called "co-conspirator" exception have involved facts that were markedly different from the facts averred in this case. *Affiliated Capital, supra; Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975), discussed *infra*.

In *Affiliated Capital*, although the Fifth Circuit explained its ruling in terms of a "co-conspirator" exception, the facts of the case demonstrate that no true governmental decision-making process was involved. In *Affiliated Capital*, the mayor of Houston and the Houston City Council had completely abdicated their legislative duties in favor of a small group of private businessmen who divided up the cable television franchise business in Houston among themselves to the exclusion of their competitors. As a result, the defendants' challenged conduct did not involve a genuine attempt to influence public officials to take governmental action.

Similarly, *Duke & Co. v. Foerster, supra*, the other appellate decision that is sometimes cited for the proposition that there is a separate "co-conspirator" exception to *Noerr*, also did not involve political expression intended to influence governmental action. Instead, the case concerned several governmental defendants' liability in connection with an economic boycott of plaintiff's products, not a private party's lobbying activities.[10]

Several courts of appeals have uniformly rejected claims of antitrust liability based upon a "co-conspirator" exception where, as here, those claims rest upon only the most conclusory allegations. These cases demonstrate that courts of appeals have regularly looked critically at efforts to avoid summary judgment or dismissal by making conclusory allegations of some loose conspiracy. Indeed, the very next year following its decision in *Affiliated Capital*, the Fifth Circuit declined to apply the co-conspirator exception in two cases where the challenged activities did not warrant an exception to the *Noerr* doctrine. In one case, the court affirmed a summary judgment entered in favor of the private defendant upon grounds of *Noerr* immunity, rejecting a claim that the case fell within the "co-conspirator" exception because there was nothing in the record beyond a mere allegation in one of the pleadings that the defendants conspired to monopolize. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, 612, n. 9 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985), *citing Metro Cable.*

In *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985), the Fifth Circuit once again affirmed a grant of summary judgment in favor of a private party, again declining to apply the "co-conspirator" exception where

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[10] In a recent decision, the District of Columbia Circuit held that *Noerr* did not protect a boycott even though its specific objective was to influence the legislative process, reasoning that the trade restraint of the boycott resulted from private rather than governmental action and was therefore primarily commercial in nature. The court referred to *Allied Tube* and explained this Court's general approach for determining whether concerted activity falls within *Noerr* in much the same way it is discussed above. *Superior Court Trial Lawyers Ass'n v. Federal Trade Commission*, 1988 Trade Cases (CCH) ¶ 68,196 (August 26, 1988).

there was no evidence to support it, only a claim that public officials had acted outside the scope of their statutory authority and thus conspired with the defendants. The court distinguished its earlier opinion in *Affiliated Capital* as falling within the "sham" exception to the *Noerr* doctrine because, among other reasons, the challenged activities were not genuinely intended to influence public officials.

The District of Columbia Circuit also declined to adopt the "co-conspirator" exception in a case in which it found, as a matter of law, that the evidence did not support a claim of conspiracy. In reaching its conclusion, the court stated that it was doubtful that the existence of a co-conspirator exception would explain any result more satisfactorily than one of the "more established" exceptions to the *Noerr* doctrine. The court specifically noted that "[i]t would make a nullity of *Noerr*" to hold a public body to be a co-conspirator just because the public body agreed with the petitioner. *Fed. Prescription Service v. Amer. Pharmaceutical Ass'n*, 663 F.2d 253, 264-65, and n.11 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).[11]

In harmony with these rulings, the Ninth Circuit in this case and the Seventh Circuit in *Metro Cable* properly declined to apply a blind "co-conspirator" exception because in neither case did the facts as alleged warrant any exception from the *Noerr-Pennington* doctrine. In both cases the plaintiffs' complaints were dismissed based upon the plaintiffs' failure, after three opportunities, to allege adequate claims. In *Metro Cable* the court emphasized, in affirming the dismissal of the second amended complaint, that the only allegations upon which plaintiffs based their antitrust conspiracy claims were that: (a) two public officials were persuaded to support the private defendants' application for a television

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[11] The Eighth Circuit also has refused to adopt a blanket "co-conspirator" exception, choosing instead to make its determination by evaluating the nature of the challenged conduct in its context. *First American Title Co. of S.D. v. S.D. Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) (use of misrepresentations not excepted from *Noerr*, at least in context of legislative lobbying).

franchise and oppose the plaintiff's application; and (b) the public officials received campaign contributions "in exchange" for this undertaking. 516 F.2d at 230. The court explained its decision as follows:

> Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a "conspiracy," and that if some of the "conspirators" persuade a member of the legislative body to agree to support their cause, he becomes a "co-conspirator" and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine.

Id. The Seventh Circuit did not hold that it would never find antitrust liability where a public official is alleged to be an active participant in the challenged conduct. Rather, the Seventh Circuit's decision, like the Ninth Circuit's opinion below, was based upon the plaintiff's inability to plead anything more than conclusory allegations that there was a "conspiracy." Thus, even if there were some room for disagreement as to the existence of, and rationale for, a separate "co-conspirator" exception, the issue is not ripe for the Court's review in this case because no conspiracy was adequately pleaded. This case remains what it has always been: a failure by Petitioners to plead facts to fall outside well-established legal principles immunizing conduct in the legislative arena. No further clarification from this Court is necessary.

In ruling that Petitioners' allegations were insufficient to allege an antitrust claim, both the district court and the Ninth Circuit applied the rule set forth in *Franchise Realty*,[12] requiring specificity in pleading a claimed exception to the *Noerr-Pennington* doctrine, in order not to chill the first amendment rights protected by the doctrine. Notably, Petitioners do not ask the Court to review that pleading standard. Moreover, the *Franchise Realty* standard is consistent with the general rule that mere conclusory allegations of an antitrust "conspiracy," without factual specificity, do not give the plaintiff fair notice of the claim asserted against it. *E.g., Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986), (affirmed

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[12] *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, supra*, 542 F.2d at 1080-81.

dismissal for failure to state a claim); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979); *see also Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177, n.8 (10th Cir. 1982) (adopted *Franchise Realty* standard).

Finally, as to Petitioners' argument that they were curtailed in their discovery efforts and thus were unable to allege facts more specifically, the district court's opinion refers to a stipulated order staying discovery until May 20, 1985. Nothing prevented Petitioners from taking discovery thereafter and before filing their Second Amended Complaint two months later.

III

THERE IS NO CONFLICT WITHIN THE NINTH CIRCUIT CONCERNING THE "CO-CONSPIRATOR" EXCEPTION

Petitioners also seek review of the Ninth Circuit's opinion in this case upon grounds that it conflicts with the Ninth Circuit's own decisions in *Harman v. Valley Nat. Bank of Ariz., supra*, and *Sessions Tank Liners, Inc. v. Joor Mfg. Co., supra.*

In *Harman* the court reversed a judgment dismissing plaintiff's antitrust claims because: (a) the complaint alleged that the challenged activity was part of a broader monopolistic scheme; and (b) the complaint alleged that a public official was a participating conspirator. However, *Harman* was long ago discredited by the Ninth Circuit in *Sun Valley Disposal Co. v. Silver State Disposal Co., supra*, 420 F.2d 341 (9th Cir. 1969). In rejecting *Harman*, the court in *Sun Valley* explained that the first prong of *Harman* had been decided otherwise in *Pennington*, and the court explained further that "[a] plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case." 420 F.2d at 343.

There is no inconsistency between the Ninth Circuit's opinion in this case and its opinion in *Sun Valley*. To the extent that the Ninth Circuit recognized the "co-conspirator" exception in *Sessions Tank Liners*, that opinion has been vacated by this Court and remanded for further proceedings. Most importantly, the Ninth Circuit's opinion is wholly consistent with its decisions in

Franchise Realty and *Llewellyn v. Crothers*, 765 F.2d 769, 775 (9th Cir. 1985), in which the court previously held that vague and conclusory allegations of an antitrust conspiracy between private and governmental defendants do not negate the important immunity of *Noerr-Pennington*.

IV

SUPREME COURT REVIEW IS NOT WARRANTED AS TO THE PLEADING DEFECTS AT ISSUE IN THIS CASE

Despite their effort to couch their arguments in terms traditionally cognizable by this Court, what Petitioners seek, in essence, is to raise disputes over pleadings defects, and perhaps even discovery, to the level of Supreme Court review. The courts below did not err in their analyses and determinations in these respects, and no proper or sufficient basis has been advanced by Petitioners for this Court to reconsider the judgment.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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